

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

STUBORN LTD. PARTNERSHIP

v.

BARNSTABLE BOARD OF APPEALS

No. 98-01

DECISION ON JURISDICTION

MARCH 5, 1999

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Appellant

v.

BARNSTABLE BOARD OF APPEALS,
Appellee

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I. PROCEDURAL HISTORY

This is an appeal pursuant to G.L. c. 40B, §§ 20-23 from the denial of a comprehensive permit by the Barnstable Zoning Board of Appeals.

The Appellant, Stuborn Limited Partnership, proposes to develop affordable condominium housing at a location near Hyannis harbor known as Freezer Point in Barnstable. The housing will be subsidized under the New England Fund (NEF) of the Federal Home Loan Bank of Boston (FHLBB), in cooperation with a member bank, the Cape Cod Bank and Trust Co. In April 1998, the developer applied to the Barnstable Board of Appeals for a comprehensive permit in order to allow the construction of residential housing in a location zoned for marine business uses. On July 15, 1998, the Board denied the permit on jurisdictional grounds, without considering the merits of the proposed housing development. The developer appealed to the Housing Appeals Committee, and the parties

agreed that if the jurisdictional issues were resolved in favor of the developer, the matter would be remanded to the Board for further proceedings on the merits. Pre-Hearing Order (Nov. 17, 1998), p. 2, Stip. 3.

This Committee accepted the appeal in this unusual posture because of the importance of the jurisdictional question presented. The Board asserts that the FHLBB New England Fund (NEF) is not a subsidy program, nor is the developer a limited dividend organization, as required by the Comprehensive Permit Law and regulations. These are closely related questions which arise because the NEF is a relatively new housing program and is structured differently from the programs under which housing has traditionally been built using comprehensive permits. The NEF was challenged previously in the case of *Hastings Village, Inc. v. Wellesley*, No. 95-05 (Mass. Housing Appeals Committee Memorandum on Motion to Dismiss Mar. 21, 1996)(hereafter cited as *Hastings Village I*). In that case, we ruled that the developer had not proven that the proposed housing development satisfied the jurisdictional requirements, and we provided guidance regarding actions the FHLBB and the developer could take to bring the NEF program within the comprehensive permit system. The NEF has been modified since then, and this case presents a further opportunity to review whether the NEF conforms to the requirements of the comprehensive permit process. We hold that on the facts presented by this proposed development, the NEF does meet those requirements and that jurisdiction exists under Chapter 40B, §§ 20-23, and we remand the case to the Barnstable Board for hearing on the merits.

II. THE NEW ENGLAND FUND AND THE FREEZER POINT DEVELOPMENT

Under the NEF, the Federal Home Loan Bank of Boston advances funds to one of its member banks, here the Cape Cod Bank and Trust Co., which in turn makes a construction loan to a developer at a below-market interest rate. Tr. 21-22, 46; Exh. 2. Such loans can be made for either housing or economic development projects, and residential loans may be for housing targeted for people whose incomes are as high as 140% of the area median income. Tr. 46, Exh. 3. Recently, the program has been modified to make it compatible with the comprehensive permit process. That is, NEF Eligibility Guidelines were modified to refer explicitly to affordable housing developments that meet what are commonly understood to be the minimum requirements of the comprehensive permit process, namely, that 25% of the owners (or renters) have incomes that do not exceed 80% of the area median income. Exh. 3, 9¹; Tr. 47, 61. The NEF neither requires that affordability be maintained in the long term, nor that the developer's profits be limited. It also does not monitor long-term compliance with comprehensive permit requirements.

The Freezer Point development will meet the above basic NEF eligibility requirements, and provisions have also been made to guarantee long-term affordability and to limit profits. That is, the developer has drafted several documents in collaboration with the FHLBB.² A deed rider (Exhibit 7) will be executed for each of the affordable units sold to ensure that upon any future resale, the unit will be sold at a discounted price to an income-

¹ Exhibits 3 and 9 are the November 5, 1998 and April 27, 1998 revisions of the NEF Eligibility Guidelines. There is no substantive difference between them, though the later version provides clarification that condominium developments are eligible for NEF low or moderate income housing funding. Tr. 54-57.

² The bank's general counsel testified that he reviewed and edited the documents to ensure that they were not inconsistent with NEF program requirements. The documents are not FHLBB documents, nor have they been specifically approved for general use within the NEF. Tr. 48-49, 51-52; Exh. 2.

eligible purchaser. A regulatory agreement³ (Exhibit 5) will be executed prior to construction by the developer and the Cape Cod Bank and Trust Co. to ensure that 25% of the units will be sold with deed riders. In the regulatory agreement, the developer also agrees to limit its profit to 20% of the project's total development costs. Finally, a monitoring services agreement (Exhibit 6) will be executed by the developer and a statewide non-profit housing organization, the Citizens Housing and Planning Association (CHAPA), to provide for long-term monitoring and enforcement of the requirements of the Regulatory Agreement.

III. STATUTORY FRAMEWORK AND HISTORICAL BACKGROUND

Only a "public agency, limited dividend, or nonprofit organization proposing to build low or moderate income housing" is eligible for a comprehensive permit. G.L. c. 40B, § 21.

Chapter 40B, § 20 defines low or moderate income housing as:

any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute....

The definition in the Housing Appeals Committee regulations, 760 CMR 30.02, is virtually identical:

any units of housing subsidized by federal and/or state government and/or local housing authority under any program to assist the construction or substantial rehabilitation of low or moderate income housing, as defined in the applicable federal or state statute or regulation....

³ "[A] regulatory agreement limiting dividends is standard operating procedure in all state and federal subsidies...." *Daddario v. Greenfield*, No. 80-03, slip op. at 9 (Mass. Housing Appeals Committee June 15, 1981), *aff'd*, 15 Mass. App. Ct. 553, 446 N.E.2d 748 (1983). "[A] regulatory agreement...is an integral condition of the grant of a subsidy." *Crossroads Housing Partnership v. Barnstable*, No. 86-12, slip op. at 9 (Mass. Housing Appeals Committee Mar. 25, 1987).

These requirements have been amplified in the jurisdictional section of the regulations, 760 CMR 31.01, so that the comprehensive permit process will function smoothly in conformity with the statute:

- (1) To be eligible to submit an application for a comprehensive permit or to file or maintain an appeal before the Committee, the applicant and the project shall fulfill the following jurisdictional requirements:
 - (a) The applicant shall be a public agency, a non-profit organization, or a limited dividend organization.
 - (b) The project shall be fundable by a subsidizing agency under a low and moderate income housing subsidy program....

When the Comprehensive Permit Law was enacted in 1969, there were only a few housing subsidy programs in existence. The field was dominated by two organizations: the Massachusetts Housing Finance Agency (MHFA) and the Federal Housing Administration. (These agencies are mentioned specifically, if only in passing, in Chapter 40B, § 23.) Most of the early cases before this Committee involved MHFA financing.

By the late 1970s, however, other agencies were also building housing. In 1978, in *Gordon v. Dennis*, No. 78-01 (Mass. Housing Appeals Committee Nov. 20, 1978), the Committee for the first time approved housing proposed under the Farmers Home Administration (FmHA) rental housing program for the elderly. In two cases in the early 1980s, the FmHA program was explicitly challenged, much as the FHLBB NEF has been questioned here. The Committee, in the case of *Berkshire East Assoc. v. Huntington*, No. 80-14 (Mass. Housing Appeals Committee Jun. 1, 1982), endorsed an FmHA development, and noted (slip op. at 3) that it “construes [the project eligibility] provision quite liberally.”⁴

⁴ Although the language of the regulation has changed, the basic jurisdictional requirement has been in effect consistently from the early 1970s until the present.

Also see general discussion in *Crossroads Housing Partnership v. Barnstable*, No. 86-12, slip op. at 5-6 (Mass. Housing Appeals Committee Mar. 25, 1987). In *Daddario v. Greenfield*, No. 80-03, slip op. at 7 (Mass. Housing Appeals Committee June 15, 1981), *aff'd*, 15 Mass. App. Ct. 553, 446 N.E.2d 748 (1983), the Committee found that the jurisdictional requirements had been satisfied even though no formal application had been submitted to the FmHA.

As housing programs continued to evolve, the Housing Appeals Committee “adapted” its procedures not only to the FmHA administrative framework, but also to that of the Tax Exempt Local Loans to Encourage Rental Housing (TELLER) program and the Homeownership Opportunities Program (HOP). *Crossroads Housing Partnership v. Barnstable*, *supra*, at 9-11 (Mass. Housing Appeals Committee Mar. 25, 1987)(TELLER program); *Stoneham Hts. Ltd. Partnership v. Stoneham*, No. 87-04, slip op. at 49 (Mass. Housing Appeals Committee Mar. 20, 1991)(HOP program).

As we noted in our decision in *Hastings Village I*, these cases provide ample precedent for a liberal application of our regulations to permit the entire comprehensive permit process to evolve in tandem with the changing world of housing subsidies. It is critical, however, that we not only provide the flexibility necessary to encourage affordable housing, but also ensure that mechanisms are in place to assure towns that the housing will be properly built, operated, and maintained in the long term. In particular, the affordable housing environment has changed dramatically in recent years. Shallow subsidies and market-driven development have replaced the deep subsidies of the 1970s and 1980s. In the past, large grants or loans that constituted significant proportions of total development costs

were provided by the state or federal government to local agencies (such as local housing authorities) or, less frequently, to private developers, under a “command and control” model. That is, in return for the subsidies, state or federal officials, through their regulatory authority, retained considerable control over the design and operation of the housing. Today, however, there has been a significant shift throughout government toward market-driven approaches.⁵ Thus, not only the NEF, but MHFA’s Eighty/Twenty Rental Housing Program and the Department of Housing and Community Development’s Local Initiative Program (LIP)(760 CMR 45.00), are programs in which cash subsidies and bureaucratic supervision are minimized and market forces are utilized to the greatest extent possible.

We believe that the NEF is the sort of affordable housing subsidy program that is crucial to current efforts to fill the need for affordable housing, and that, as demonstrated below, the Freezer Point development is low or moderate income housing as defined by Chapter 40B. We also believe that although there is less centralized federal (or state) control in the NEF, it will nevertheless function within the comprehensive permit process in a manner that will maintain protections for towns. In fact, it will empower them to make more decisions about the affordable housing that is built within their boundaries, and so increase local control over the process.

⁵ For an overview of this trend in the area of environmental regulation, where it has received the most attention, see Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 Harv. Envtl. L. Rev. 103-202 (1998).

IV. THE PROPOSED HOUSING DEVELOPMENT SATISFIES THE JURISDICTIONAL REQUIREMENTS OF G.L. c. 40B.

A. The NEF housing proposed here is fundable by a low or moderate income housing program.

“To be eligible... for a comprehensive permit... [t]he project shall be fundable by a subsidizing agency under a low or moderate income housing subsidy program.” 760 CMR 31.01(1)(b). Low or moderate income housing is “housing *subsidized* by the *federal... government* under any *program* to assist the *construction* of... *low or moderate income housing*, as defined in the applicable federal... statute....” 760 CMR 30.02. We will examine each component of this definition, drawing upon and quoting liberally from our decision in *Hastings Village I, supra*.

1. “**Construction**” - Though NEF funds might well be used to make existing housing affordable, they certainly are also available for new construction, as is the case here. Exh. 3, 9; Pre-Hearing Order (Nov. 17, 1998), p. 1, Stipulation 1.

2. “**Low or Moderate Income Housing Program**” - There are three fundamental criteria that must be met if housing is to be eligible for a comprehensive permit. They relate to the income level of its occupants, the proportion of housing within the development that is affordable, and the duration of the affordability requirements.

First, the housing must be for occupants whose income does not exceed 80% of the median income as established by U.S. Department of Housing and Urban Development (HUD) for the relevant Metropolitan Statistical Area. *Hastings Village I, supra*, slip op. at 8;

also see Exh. 10 (DHCD Subsidized Housing Inventory, note 5(A)(1)).⁶ Second, though affordability is not required of *all* the housing units in a development, a minimum of 25% of the units must be for families at 80% of median income.⁷ See *Cedar Street Assoc. v. Wellesley*, No. 79-05, slip op. at 9 (Mass. Housing Appeals Committee Mar. 4, 1981), *aff'd*, 385 Mass. 651, 433 N.E.2d 873 (1982); also see Exh. 10 (DHCD Subsidized Housing Inventory, note 5(A)(2)). Third, the housing must remain affordable for at least fifteen years (the "lock-in period"). *Lee Housing Authority v. Lee*, No. 89-08, slip op. at 6 (Mass. Housing Appeals Committee Dec. 18, 1989), *aff'd*, No. 90-00021 (Berkshire Super. Ct.

⁶ In general, the Committee looks to the Department of Housing and Community Development for guidance on matters of policy. See, e.g., *Little Hios Hills Realty Trust v. Plymouth*, No. 92-02, slip op. at 6 (Mass. Housing Appeals Committee Sep. 23, 1993). The notes to the DHCD Subsidized Housing Inventory are an example of DHCD policy published as guidelines rather than as formal regulations, and we give them serious consideration, though we are not bound by them. Thus, we cite note 5 in support of the "25% at 80%" standard that we state above, particularly because it deals with the issue with considerable specificity and thoughtfulness.

On the other hand, Appendix A to the Subsidized Housing Inventory lists the NEF as a program "not usually deemed low or moderate income housing...." But there are no specifics to indicate the reasoning behind this conclusion (and no evidence was introduced on this point), and we do not feel constrained by it in reaching a decision on the ultimate issue raised in the case before us. This is reinforced by footnote 1 of Appendix A itself, which explains that the listing "does not provide a conclusive indication as to whether any... housing... is... low or moderate income housing... [since] such determinations are subject to review by the Housing Appeals Committee...."

DHCD could have expanded its guidelines to express its views with regard to some of the other requirements defining acceptable affordable housing that we address later in this decision. In fact, it could have gone beyond that and provided binding direction to the Committee, since it is the agency that formally promulgates the Committee's regulations. It has not chosen either of these options, presumably preferring to allow the law in a complex area such as this to evolve on a case by case basis.

⁷ Fewer affordable units are acceptable if the income limitation for occupants is lower. For instance, the requirement found in the TELLER and the Low Income Housing Tax Credit programs, that 20% of the units be affordable to people with incomes not in excess of 50% of median, is also acceptable. (This requirement is found in section 142(d) of the Internal Revenue Code of 1986, 26 USC 42(g)(1), and the option of providing 40% of the units to families at 60% of median income is also permitted, as it is in the NEF.) The TELLER program was held to be within the statutory framework in *Crossroads Housing Partnership v. Barnstable*, *supra*, slip op. at 9-11. Also see *Stoneham Heights Ltd. Partnership v. Stoneham*, *supra*, at 33; *Lexington Ridge Assoc. v. Lexington*, No. 90-13, slip op. at 2 n.4 (Mass. Housing Appeals Committee Jun. 25, 1992).

June 29, 1990); *Daddario v. Greenfield*, *supra*; also see Exh. 10 (DHCD Subsidized Housing Inventory, note 5(A)(2)).⁸

⁸ The three minimum requirements described above are not explicitly stated in the statute or our regulations. They have been generally accepted within the housing community, however, and are an integral part of the comprehensive permit system. When a comprehensive permit brings changes to a neighborhood that would not have been permitted under local zoning, it has always been understood that there must be a significant public benefit in return. Housing for higher income occupants or affordable housing in smaller proportion than described above or housing that remains affordable for less than 15 years is unacceptable. Further, these are minimum requirements, and it is not uncommon for programs or individual developments to exceed the minimums. See, e.g., the Homeownership Opportunity Program (760 CMR 20.05, requiring 30% of units to be affordable); *Lexington Ridge Assoc. v. Lexington*, No. 90-13, (Mass. Housing Appeals Committee June 25, 1992)(requiring affordability in perpetuity).

In its *amicus* brief, the Massachusetts Housing Finance Agency has emphasized the importance of the last part of the phrase "low or moderate income housing *as defined in the applicable... statute...*," and argues that the Committee has no power to impose a maximum income level to which a housing program must adhere in order to come within the comprehensive permit law. Brief of MHFA as Amicus Curiae, p. 7 n.3 (Dec. 15, 1998). Thus, it would argue, if the state or federal legislature created a housing program using the words "low or moderate income housing," and specifically stated eligibility requirement of 200% of median income, such housing would be eligible for a comprehensive permit. (The developer makes a parallel argument, reading a similar reference to the "applicable statute" in the 760 CMR 30.02 definition of limited dividend organization as rendering the statutory reference to limited dividend meaningless whenever a housing program does not explicitly define such a limit. See Appellant's Closing Brief (Dec. 17, 1998), p. 18.) We do not believe that this was the intent of the legislature.

We remain confident that in construing section twenty of the statute, minimum standards (80% of median income, 25% affordable, and 15-year lock-in) must be read into the definition. The statutory language is not of the sort which lends itself to interpretation by rigorous, logical analysis or by simple rules of statutory construction. In fact, the definition is poorly drafted, and its logic is circular: "Low or moderate income housing [means] housing subsidized... under any program to assist the construction of low or moderate income housing." In the first case arising under this statute, the Supreme Judicial Court noted the ambiguity in the section twenty definition and the need for administrative interpretation, citing *Cleary v. Cardullo's, Inc.*, 347 Mass. 337, 344, 198 N.E.2d 281, 286 (1964). *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 368 n.10, 294 N.E.2d 393, 414 n.20. We believe that minimum standards are essential to the proper functioning of the comprehensive permit process, and the importance of a definitive ruling by the Committee is "never greater than where, as here, an agency must interpret a legislative policy which is only broadly set out in the governing statute." *Consolidated Cigar Corp. v. D.P.H.*, 372 Mass. 844, 850, 364 N.E.2d 1202, 1207 (1977)(citations omitted). This is especially true when an agency, such as ours, has been given broad discretionary authority to deal with an entire area of activity. See *Simon v. State Examiners of Electricians*, 18 Mass. App. 17, 34 n.7, 462 N.E.2d 1116, 1126 n.7 (dissent); also see *Grocery Manufacturers of America, Inc. v. D.P.H.*, 379 Mass. 70, 75, 393 N.E.2d 881, 886 (1979)("An agency's powers are shaped by its organic statute taken as a whole."); *Berrios v. D.P. Welfare*, 411 Mass. 587, 595, 583 N.E.2d 856, 861 (1992); *LeBeau v. D.E.T.*, 422 Mass. 533, 537, 664 N.E.2d 21, 24 (1996). Finally, "significance in interpretation must be given to a consistent, long continued administrative application of an ambiguous statute..." *DiGianni v. Contributory Retirement Appeal Board*, 421 Mass. 350, 355, 657 N.E.2d 221, 224 (1995).

Further, the absence of a precise definition of "low or moderate income housing" in Chapter 40B has been of little concern, since, as we noted in *Hastings Village I*, the term has always been understood to track the federal definition used by HUD. See, e.g., 42 USC 5302(a)(20)(A) (federal community development activities); also see 12 USC 1430(j)(13)(A) (FHLB Affordable Housing Program, which uses the same definition). Where the legislature has referred to income limits in individual housing programs, it has generally referred to this standard. See, e.g., G.L. c. 21B, § 26(m) (TELLER, 760 CMR 21.02); St. 1987, § 3, line item 3722-8878 (Rental Housing Development Action Loan Program, 760 CMR 42.02 (repealed)); St. 1993, § 2, line item 3722-8900 (Housing Stabilization Fund, 760 CMR 24.02).

The housing proposed here meets these three requirements. The NEF eligibility guidelines, in describing affordable subdivisions, condominiums, and multifamily housing, refer explicitly to the need to have 25% of the units affordable to people with incomes at 80% of median. Exh. 3, 9. And, this project has specifically committed to meeting this standard.⁹ Exh. 5, p.1, ¶ C; Tr. 21. With regard to the third requirement, the NEF does not require any long-term affordability restrictions. But deed restrictions accepted by the FHLBB will be placed on the affordable units so that whenever a unit is sold, it will only be resold to another low or moderate income person, thus “locking in” affordability in perpetuity. Exh. 7, p. 1; Tr. 24; also see *supra*, note 2.

3. “Subsidized” - Funds for construction of the housing here will be loaned by the Cape Cod Bank and Trust Co. as a member bank in the FHLB System; the Cape Cod Bank and Trust Co., in turn, will have borrowed the funds from the FHLBB. Tr. 22, 49-50; Exh. 2, 3, 8, 9. As we noted in *Hastings Village I*, the FHLBB receives no direct federal funding. *Andrews v. FHLB of Atlanta*, 998 F.2d 214, 215 (4th Cir. 1993). But financing will be provided at a low interest rate, and it is generally understood that “the funds handled by these

Certainly, amendment of the law by the legislature to clarify the definition of low or moderate income housing would be helpful. But despite this and other ambiguities in the statute, there have been no significant changes during the 30 years since it was enacted. This is perhaps in part because from its inception, the comprehensive permit process has been controversial, and its supporters have been reluctant to expose the law to attack on the floor of the legislature. But more important, a body of case law and practice has grown up interpreting the more ambiguous provisions, and the legislature has apparently been satisfied to permit the administrative body it established and the courts to make the necessary refinements. (Whatever the motivation, in 1989, the legislature established a bipartisan commission whose unanimous recommendations “reflect[ed] the need for change in [the] law,” but concluded that changes should be made administratively, rather than statutorily. Report of the Special Legislative Commission Relative to the Implementation of Low and Moderate Income Housing Provisions, at 21, 28 (1989).)

In any case, the development as proposed in this case meets the traditional 80% of median income standard and it will limit its profits (see § IV-B, below). Thus, we need not consider a hypothetical development in which there is a higher eligibility limit set by statute or no profit limitation.

⁹ Note that the regulatory agreement has a blank to be filled in for the percentage of units which are to be affordable. Presumably, this is to allow flexibility to increase the percentage above 25%.

banks are... public funds.”¹⁰ *Fahey v. O'Melveny & Meyer*, 200 F.2d 420, 454 (9th Cir. 1951). Under similar circumstances, the Supreme Judicial Court has already noted that the word “subsidy” should not be limited to grants of money (the Black's Law Dictionary definition), but rather should include “[h]elp, aid, [or] assistance” generally. *Wellesley v. Housing Appeals Committee*, 385 Mass. 651, 655, 433 N.E.2d 873, 876 (1982); *Charlesbank Apartments, Inc. v. Boston Rent Control Admin.*, 379 Mass. 635, 637 n.4, 399 N.E.2d 1078, 1079 n.4. (holding that a federal program that merely provided mortgage insurance was a subsidy program under Boston's rent control ordinance). In *Wellesley*, the Court declared that MHFA financing was a subsidy under Chapter 40B, noting that “[t]he intention of the Act [establishing the MHFA, St. 1966, c. 708] ‘is to make available mortgage financing at favorable interest rates to housing projects in which [at least] one quarter of the tenants will be in the “low income” category and the other tenants will be moderate income.... The savings in interest is to be applied in part... to making possible lower rentals to “low income” tenants, who may also receive the benefit of rent subsidies....’ *Massachusetts Housing Finance Agency v. New England Merchants Nat'l Bank*, 356 Mass. 2020, 209, 249 N.E.2d 599 (1969).” *Wellesley v. Housing Appeals Committee*, *supra*, at 655-656, 876. Also see 760 CMR 30.02, definition of “subsidy.”

We therefore find that the financing mechanism here is a public subsidy quite similar to MHFA financing, and constitutes a subsidy.

¹⁰ The questions of whether the funds are public funds and whether the Bank's functions are public are nearly identical to the question of whether the bank is part of the federal government, which is discussed in detail in § IV-A(4), below.

4. “Federal Government” - The Federal Home Loan Bank Act established the Federal Housing Finance Board (known prior to 1989 as the Federal Home Loan Bank Board) as “an independent agency in the executive branch of the Government.” 12 USC 1422a(a). The Federal Home Loan Bank System (a term specifically defined in the Act) in turn is made up of individual Federal Home Loan Banks, such as the FHLBB, which serve discrete geographical areas designated by the Federal Housing Finance Board. 12 USC 1422(2)(B), 1423; Stip. 6. These banks are “supervised” by the Federal Housing Finance Board. 12 USC 1422a(a)(3). Each Bank is a corporation owned by “member” banks which have subscribed to its stock. 12 USC 1422(2)(A), 1424, 1426; Pre-Hearing Order (Nov. 17, 1998), p. 2, Stip. 7.

The federal courts have differed as to whether Federal Home Loan Banks are federal agencies. On the one hand, the Ninth Circuit Court of Appeals noted that “while Home Loan Banks are operated under carefully delineated private management,... they are governmental banking agencies.” *Fahey, supra*, at 454. They are “public banking agencies and instrumentalities of the federal government” “organized to carry out public policy, [and their] functions are wholly governmental.” *Fahey, supra*, at 447, 446. Similarly, the District Court of Northern California found a Bank to be an agency under the Federal Administrative Procedure Act. *Fidelity Financial Corp. v. FHLB of San Francisco*, 589 F.Supp. 885, 894-895 (N.D.Cal. 1983), *aff’d*, 792 F.2d 1432 (9th Cir., 1986). The Appeals Court, however, in reviewing the decision, noted that there are both governmental and private aspects of the Bank, and then declined to rule on the issue. *Fidelity Financial Corp. v. FHLB of San Francisco*, 792 F.2d 1432, 1435-1436 (9th Cir., 1986). On the other hand, the Fourth Circuit

Court of Appeals held that a Bank is “more like a private entity than... part of the federal government” for purposes of determining whether First Amendment rights apply to employees. *Andrews v. FHLB of Atlanta*, *supra*, at 216.

State law also recognizes that an organization may be “a hybrid entity, possessing attributes both of a private corporation and an executive agency of the Commonwealth.” *Dept. of Community Services v. Mass. State College Bldg. Auth.*, 378 Mass. 418, 425, 392 N.E.2d 1006, 1010 (1979); *Woods Hole v. Martha's Vineyard Commission*, 380 Mass. 785, 797, 405 N.E.2d 961, 969 (1980). We note that the MHFA itself is “a body politic and corporate... not subject to the supervision or control of... any... agency of the commonwealth, [and] a public instrumentality... [performing] an essential governmental function.” St. 1966, c. 708, § 3. Since MHFA is the prototypical subsidizing agency¹¹ under the comprehensive permit law, it follows that the FHLBB's hybrid nature does not disqualify it.

The most important principle emerging from the above cases is that the same entity may be considered public or private depending on the context in which the issue arises. Thus, it is crucial “to look to the purpose of the provision at issue.....” *Okongwu v. Stevens*, 396 Mass. 724, 730-731, 488 N.E.2d 765, 769 (1986)(holding that the MBTA is not a state agency for purposes of Mass. Rule of Appellate Procedure 4(a), which concerns the time for filing of notice of appeal). And, “[w]hen [a term] of a statute is imprecise..., it is our duty to give the [term] a reasonable construction, *taking into account the legislative purpose* and the statute as a whole.” *MBTA Retirement Board v. State Ethics Commission*, 414 Mass. 582, 588, 608 N.E.2d 1052, 1055 (1993)(citation omitted, emphasis added) (approving the

¹¹ See *Wellesley v. Housing Appeals Committee*, *supra*, at 654-656, 875-876.

Commission's four-part test and holding a retirement board not to be a state agency within the state conflict of interest law).

There is no doubt that the intention of the legislature in enacting the comprehensive permit law was to create a flexible process that would assist in building low or moderate income housing using available financing mechanisms. *See Hanover v. Housing Appeals Committee*, 363 Mass. 339, 347-355, 294 N.E.2d 393, 402-407 (1974). With this purpose as the context, we will examine the four factors discussed in *MBTA Retirement Board v. State Ethics Commission*, *supra*.

First, the FHLBB itself, though a hybrid entity, is clearly authorized legislatively. The NEF is not a separate entity, but a program within the Bank. Similar nationwide affordable housing programs, i.e., the Community Investment Program and the Affordable Housing Program, are specifically mandated by the statute. 123 USC 1430(i), (j). As a local New England program, the NEF draws its mandate from the FHLB System's general purpose "of providing funds for residential housing finance." 12 USC 1430(a). Thus, the NEF has a moderate amount of "legislative underpinning." *See MBTA Retirement Board v. State Ethics Commission*, *supra*, at 589, 1056.

Second, we consider whether the FHLBB through the NEF performs some "essentially governmental function." The provision of general banking services is probably not such a function. *See Andrews v. FHLB of Atlanta*, *supra*, at 219.¹² Arguably, the FHLB System's overall function, supporting and stabilizing the "residential housing finance"

¹² In *Andrews*, the Court says in no uncertain terms, "The functions performed by the Bank...—banking and bank examining—are not traditionally and exclusively public functions." This statement, however, was made in the particular context of determining whether a Bank employee has First Amendment rights as an employee of the federal government.

market, is a governmental function, at least in some contexts. The more specialized function of the FHLBB NEF is to finance middle-income housing. In this case, the NEF will be used to finance new, long-term, low or moderate income housing. There is a shortage of such housing, and because financing for the construction of such housing has not traditionally been available in the private market, its provision is an essentially governmental function.

The third factor to be considered is whether NEF funds are public funds. Unlike the funds in *MBTA Retirement Board v. State Ethics Commission*, *supra*, at 591, 1057, there is no one who has a “private interest” in NEF funds, and we view these as public funds, as did the Court in *Fahey v. O'Melveny & Meyer*, *supra*.

Fourth is the question of governmental supervision. A federal agency, the Federal Housing Finance Board, “supervise[s] the Federal Home Loan Banks... to ensure that [they] carry out their housing finance mission.” 12 USC 1422a(a)(3)(B). This supervision, however, does not appear to include close, day-to-day supervision over the NEF. *See Hastings Village I*, slip op. at 19.

Because the provision of affordable housing financing is an essentially governmental function, and also because of the NEF's legislative underpinnings, the public nature of the funds, and the supervision provided by the Federal Housing Finance Board, we conclude that, for purposes of the Comprehensive Permit Law, the FHLBB NEF is a program of the federal government.

B. Stuborn Limited Partnership is a limited dividend organization.

Chapter 40B and our regulations require that “[t]he applicant shall be a... limited dividend organization.” 760 CMR 31.01(1)(a); see G.L. c. 40B, § 21.

“Limited dividend organization” is not a defined term in Chapter 40B. Rather, it is any sort of legal entity which agrees to be bound by an appropriate profit limitation. In *Woodcrest Village Assoc. v. Maynard*, No. 72-13, slip op. at 3-5 (Mass. Housing Appeals Committee memorandum Feb. 13, 1974), we held that it “was not necessary for the Appellant to be a duly organized limited partnership at the time of its application to the Board... [since it] will be eligible to receive a subsidy when the project has been approved.” That is, this Committee’s approach has been to require only that the profit limitation be established before construction actually begins. Though limitation of profit is statutorily required, it is not a prerequisite characteristic of the development entity, but rather an element in the process of approval of a project as low or moderate income housing. As the Supreme Judicial Court noted in affirming *Woodcrest Village*, the developer “was a ‘limited dividend organization’ if it was eligible to receive a subsidy.” *Maynard v. Housing Appeals Committee*, 370 Mass. 64, 67, 345 N.E.2d 382, 385 (1976); also see *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 8 (Mass. Housing Appeals Committee Jun. 28, 1994).

The regulatory agreement that will be executed by the developer limits its profits to 20% of total development costs. Exh. 5, p. 3, § 4. This profit limitation is the same one used in the Department of Housing and Community Development (DHCD) Local Initiative Program (LIP). Tr. 31. Since the profit limitation here is consistent with that of other affordable housing programs that meet the requirements of Chapter 40B, and since it is enforceable by means of the regulatory agreement which must be signed prior to construction, we conclude that Stuborn Limited Partnership is a limited dividend organization.

V. PROTECTION OF THE TOWN OF BARNSTABLE

In considering an affordable housing development, the central concern of a town is not the nature of the financing or the source of the subsidy, but rather whether local planning, environmental, and other concerns will be addressed. First and foremost, Barnstable is concerned with its physical environment. That is, it is concerned that the proposed housing be appropriate for the location in terms of aesthetics, infrastructure needs, compatibility with neighboring uses, and other planning issues. This is particularly true of so-called "hostile projects," in which the developer shows little interest in collaborating with town officials and neighbors.

Equally important, however, is the concern that enforcement mechanisms are in place to ensure that programmatic requirements the developer has accepted are in fact complied with. Will the proper number of units be designated as affordable? How will the affordable units be dispersed throughout the development? Will their occupants meet the income guidelines? How will purchasers of the affordable units be chosen from among a large number of applicants? Will differences between affordable units and market-rate units in size, appearance, or amenities be permitted? Will affordability be maintained in the long term?

Chapter 40B is not explicit with regard to these issues; rather, protections for towns have evolved within the administrative process during the three decades the law has been in effect. We enumerated many of these issues in *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 4-9 (Mass. Housing Appeals Committee Jun. 25, 1992), and then in *Hastings*

Village I, slip op. at 22-23. In the latter, we noted that matters that in the past were addressed almost entirely by the subsidizing agency may be left to due diligence of the FHLBB and its member bank. But because the role of the FHLBB in NEF projects is significantly different from the role of the subsidizing agency in a more traditional programs, it is important to review each of these issues in some detail, referring specifically to the particular factual circumstances presented here, to ensure that the town is to be protected in each instance. We will discuss design issues, programmatic issues, financial issues, and long-term monitoring.

A. Design - Preliminary designs for both the site and the individual buildings must be reviewed and approved. A myriad of health, safety, and design issues must be considered—both those pertaining to the site and the proposed buildings themselves, and those that relate to neighboring uses, the overall environment, and established town planning practices.¹³ The Cape Cod Bank and Trust Co. has preliminarily reviewed the site and the housing design. Tr. 102, 103, 109; Exh. 8. We can assume that this review has been reasonably thorough since the bank is only interested in financing a project in which its investment will be secure. The proposal will be reviewed more thoroughly as part of the bank's underwriting prior to issuing a formal loan commitment. Tr. 109-110.

But the bank's review is limited in two ways. First, as we have noted in the past, review of design at this stage is preliminary and need not be exhaustive. *See Hastings Village I*, at 23; *CMA, Inc. v. Westborough*, *supra*, at 5-7. Second, certain design issues are

¹³ E.g., bona fide comprehensive planning concerns are an important factor to be considered in reviewing a comprehensive permit application. *See KSM Trust v. Pembroke*, No. 91-02, slip op. at 6 (Mass. Housing Appeals Committee Nov. 18, 1991), *Harbor Glen Assoc. v. Hingham*, No. 80-06, slip op. at 12-14 (Mass. Housing Appeals Committee Aug. 20, 1982).

of much greater concern to the town than to the bank, and in some cases the interests of the public and the financial interests of the bank may be in conflict.

For instance, the site here is a unique waterfront location (see Tr. 76, 130), and the Board is clearly in a better position than the bank (or the developer, or even a traditional subsidizing agency) to evaluate to what extent competing uses should be accommodated. Of course, for a site like this it is not sufficient for the town to simply say that it has a general interest in continuing to use this land for commercial purposes in recognition of the town's history as a seaport. But if specific commercial uses have been identified in previous planning, there might be justification for modifying the project or even denying the permit. That is, if there is a town comprehensive plan which suggests a use for the land that would provide a significant public benefit, such as a public marketplace, but the project provides only a relatively small number of affordable housing units, the balance under our statute might well weigh in favor of the local concerns and against the housing need. Similarly, even without previous planning, at a site such as this the town might be able to articulate an interest in preserving the commercial and maritime value inherent in the meeting of the land and the sea. This interest could be sufficient to justify a requirement that some commercial use be maintained by building a mixed-use development. (See Tr. 125.) Or, if the town were eager to preserve some sort of limited public access, as is often provided for in waterfront development, it might require that.¹⁴

¹⁴ The extraordinary benefits to the developer inherent in a comprehensive permit may be sufficient to justify impositions for the public benefit that under other circumstances might be considered unconstitutional takings. Cf. *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 1309 (1994); *Young v. Planning Board of Chilmark*, 402 Mass. 841, 525 N.E.2d 654 (1988); *Lexington Ridge Assoc. v. Lexington*, No. 90-13, slip op. at 50-51 (Mass. Housing Appeals Committee June 25, 1992).

In light of all of these issues that are of critical concern to the town, we expect the Board, in consultation with other town bodies, such as the planning board and the Housing Committee (see Tr. 123), to review the project design very thoroughly on remand.

B. Programmatic Details - Next, programmatic aspects of the project must be acceptable. This involves both the minimum Chapter 40B standards, and also matters of more general public policy, all of which must be finalized prior to the issuance of a comprehensive permit and then monitored for compliance throughout the lock-in period. The minimum standards (described in § IV(A)(2), above) concern the income levels of the occupants, the proportion of the housing that is affordable, and the duration of the lock-in period. The other policy issues may vary in different developments, but certainly include such matters as placement and dispersal of the affordable units, whether interiors and exteriors of affordable units must be identical to those of market units, the mix of ownership and rental units, the sales prices or rents for units and the mechanisms to adjust them for inflation, affirmative fair marketing and occupant selection, limitations on condominium fees, and profit limitations.

In this case, the record shows that the three basic standards will be met. There may be specific details, however, that need further attention on remand. For instance, in the regulatory agreement, the percentage of affordable units has not been set. In a traditional housing program, this would be set by the subsidizing agency. But here, the FHLBB has made it clear that it will not review this sort of detail. Therefore, it is left for negotiation

between the developer and the town, and must be addressed on remand and in the Board's final decision.¹⁵

The deed rider should be acceptable since it is modeled after the deed rider generally used in DHCD's LIP program, and is designed to restrict the units in perpetuity. But it has not been substantively reviewed by the FHLBB, and changes in details may have unintended effects. If there are questions about its enforceability or even about features carried over from the LIP deed rider,¹⁶ these may be reviewed by the Board. For example, the town may wish to look into small, technical matters such as the question of transfer of the unit upon death of the owner. See Tr. 132, 138. Or it may wish to consider more complicated questions of policy. For instance, an affordability restriction may be lost if an eligible purchaser cannot be located in a timely manner when the original owner desires to sell. Exh. 7, p. 3, § 1(b). Though the deed rider gives the town the right to purchase the unit itself, it may not have ready cash to do so. Consideration could be given to establishing a fund to address this, using the monitoring services agreement or some other mechanism.

Among the more general policy issues, an issue that may be unique to this development because of its very desirable waterfront location is that of outdoor amenities. What amenities are planned? Will they all be used in common only by residents of the condominium or will some be accessible to the public? Will there be any private outdoor

¹⁵ The developer has indicated a willingness to negotiate, at least with regard to local involvement in monitoring of the development. Tr. 27, 39. Even in traditional subsidy programs, where the subsidizing agency typically provides model regulatory agreements and deed riders, changes in those documents are frequently negotiated. See, e.g., *Lexington Ridge Assoc. v. Lexington*, No. 90-13, (Mass. Housing Appeals Committee June 25, 1992)(holding that a board may require that housing be maintained as rental in perpetuity).

¹⁶ Interestingly, the deed rider that is proposed here, in one area at least, provides greater protection for the town than the standard LIP deed rider since the seller has an independent obligation to use "diligent efforts" to find a buyer even if the town does not attempt to do so. Exh. 7, p. 2, § 1(b).

amenities for individual unit owners only, and if so, will the same amenities be provided for affordable unit owners as for market rate unit owners? Related to this is the question of whether the units must be identical, as required by some housing programs, or whether it is more sensible for the huge disparity in value between the affordable and the market rate units to be reflected in their size and appearance.¹⁷ Another policy question which may be of particular concern to the town is how buyers of units are qualified and chosen. It may wish to use asset limitations and lottery procedures modeled after the LIP program. See Tr. 39, 83, 94, 131; 78, 79, 92, 105, 132.

These general issues are apparently given little or no consideration by the FHLBB, though in fairness to the developer, a number of them are addressed adequately in the regulatory agreement. Nevertheless, the Board, in consultation with other local officials, should review them carefully on remand.

C. Finances - Before proceeding with any development, pro forma financial statements must be reviewed to ensure that various financial projections, including profit margins, are sufficiently accurate so that the project is financially feasible, while remaining within profit limitations established for the project. The developer's credentials and experience must be reviewed to ensure that it is qualified to handle the particular project. And market conditions must be examined to ensure that the completed project will be marketable.

¹⁷ Market rate units will be sold for \$350,000, while affordable units will cost only \$69,000. Tr. 114.

In traditional programs, these issues are characteristically within the province of the subsidizing agency, and in most cases not proper areas of inquiry for the Board.¹⁸ The subsidizing agency, we have said, can be relied on to review finances, while the Board should focus on local concerns such as increased traffic on surrounding streets or possible difficulties in the provision of municipal services. The project's financial structure, the developer's qualifications, and market conditions are all matters that any lender, public or private, will review thoroughly in order to protect its own investment. Therefore, to rely, to a certain extent at least, upon the due diligence of the FHLB system, including the Cape Cod Bank and Trust Co. to review these matters is absolutely appropriate in today's market-oriented affordable housing environment.¹⁹ But, it is also apparent that the review by the Cape Cod Bank and Trust Co. will not be of exactly the sort done by a governmental agency, and in any case, it will not be subject to public scrutiny. Therefore, we believe that limited,

¹⁸ See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 24 (Mass. Housing Appeals Committee Jun. 25, 1992). As the Committee pointed out in its decision in the *Hanover* case, however, the local board has a limited interest in ensuring that the developer is eligible for funding so that an unrealistic proposal will not proceed or a site will not be unnecessarily tied up by a comprehensive permit. *Country Village Corp. v. Hanover*, No. 70-03, slip op. at 8 (Housing Appeals Committee Sep. 13, 1971), *aff'd*, 363 Mass. 339, 294 N.E.2d 393 (1973). But its interest does not go beyond that. Thus, as the Supreme Judicial Court elaborated on appeal in *Hanover*, the board or the Committee may require full disclosure and compliance with the funding program requirements to protect everyone involved, but the ultimate determination of such issues is "properly left to the appropriate State or Federal funding agency." *Hanover v. Housing Appeals Committee*, *supra*, at 379, 420.

¹⁹ As we noted in *Hastings Village I*, slip op. at 26, "Years ago, housing was typically built and operated directly by the public sector, often in the form of public housing. Though much of such housing was successful, there were problems as well. As a result, increasing emphasis has been placed on taking advantage of the discipline provided by market forces. The creation of the MHFA, as a quasi-public housing entity able to finance privately constructed housing was a first step in that direction. The trend continued with programs such as HOP, which gave private developers more freedom. The FHLB System of providing both financing and underwriting through private banks... but another example. The underwriting done by [the private member bank] to protect its own (and the FHLBB's) investment, which presumably includes reviewing the arrangements which have been made to manage the development throughout the lock-in period, provides exactly the sort of protection that MHFA underwriting has provided."

secondary review of these issues by the Board is necessary and proper, and should take place upon remand.

The profit limitation may require particular attention, especially since here, as in other programs, any excess profit is to be returned to the town for use in other affordable housing initiatives. Exh. 5, p. 3, § 4. First, calculation of the profit for a development such as this is complicated, and the result may vary depending on the assumptions used. See Tr. 128-129; also see, generally, *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 14, n.11 (Mass. Housing Appeals Committee decision Jan. 8, 1998)(*Hastings Village II*)(indicating different possible interpretations of definitions in the context of a rental development). For that reason, the Board might consider defining the profit limitation in more detail than it is now defined in the regulatory agreement. Second, the regulatory agreement provides for submission of a statement of costs and “gross sales revenues... certified by the developer” upon completion of construction. The Board might well require a full compilation and certification of total development costs (net of related-party expenses) and total revenues, on a federal income tax basis, prepared and certified by a certified public accountant acceptable to the monitoring agent or the town.

D. Long-Term Monitoring - Long-term monitoring is always problematic, even for traditional housing programs. It is more so here. Neither the FHLBB nor the Cape Cod Bank and Trust will have any significant role in monitoring, and even their financial interest will dissipate after construction. Tr. 53, 107-108. In *Hastings Village I*, slip op. at 28, we raised the concern that a “government agency with little or no financial stake in the project would have little incentive to monitor it carefully.... [A] town that permanently changes its

zoning is entitled to the protection of thorough oversight of the project by a subsidizing agency.” This is of even greater concern here, because the developer proposes to hire a private organization, the Citizens Housing and Planning Association (CHAPA) to monitor the development pursuant to a monitoring services agreement. Exh. 6. Though CHAPA is a well-known, statewide nonprofit housing organization, it would be preferable to use a government agency such as MHFA, DHCD, or a local Housing Authority to oversee the monitoring, whether or not that agency chose to use a subcontractor to do the day-to-day work.²⁰ A governmental agency has two advantages. First, it is subject to public oversight. That is, if local residents are not satisfied with the quality of work being performed, they have recourse, however indirect, through their elected public officials. Second, there is permanency associated with government that is lacking in a private organization.

Neither of these drawbacks, however, precludes using CHAPA as the monitoring agent, particularly since the Board can strengthen the monitoring services agreement if it is sufficiently concerned.

First, even if we were to assume that CHAPA would not perform its function adequately, the town can be protected. The proposed regulatory agreement will be signed by the developer and the Cape Cod Bank and Trust Co. The primary post-construction issues governed by this agreement with which the town is concerned are the profit limitation and the initial sales prices of affordable units.²¹ If the Board anticipates that CHAPA will not

²⁰ Little evidence was introduced as to CHAPA’s qualifications, and the developer noted that it was amenable to using a different monitoring agent if the town so desired. Tr. 26; also see Tr. 29, 92, 97.

²¹ The town can maintain control over most construction issues (and even post-construction changes in physical aspects of the development) without recourse to the regulatory agreement simply by being vigilant in issuing building and occupancy permits.

enforce these (or other) requirements adequately, we suggest that it has the power on remand to require that the regulatory agreement be changed so that the town becomes a party to the agreement with full or secondary enforcement authority. This is the model used in the LIP program, in which the regulatory agreement is signed by the developer, the subsidizing agency (DHCD), and the municipality. (With regard to the deed rider, the town is already well protected since it has a right both to purchase and to find an eligible buyer for any affordable unit that is to be sold. Exh. 7, pp. 7-8, § 5.)

Second, regarding the question of the permanency of a private organization such as CHAPA, we simply suggest that the Board on remand give careful consideration to requiring a provision in the monitoring services agreement for the selection of a new monitoring agent should CHAPA be dissolved or become incapable of fulfilling its obligations during the 99-year term of the agreement.

We also note that if CHAPA fails to perform its duties, the monitoring services agreement may preclude any recovery by the town under third party beneficiary theory. See Exh. 6, p. 4, § 5. We suggest here as well that the Board has the power on remand to require that the monitoring services agreement provide for some sort of limited third party beneficiary liability on the part of CHAPA as a private monitoring agent.²²

E. The Burden and Benefits of Project Review and Monitoring - Compared with traditional housing programs, an NEF project places a burden on the town to be more actively involved in design, programmatic issues, finances, and monitoring. This requires more time, energy, and resources. Many towns have already chosen to dedicate more of their resources

²² A liquidated damages provision might well be helpful in providing certainty for the parties.

to housing—Barnstable, with its Housing Committee (see Tr. 120-123) is an excellent example. Others will opt for judicious use of consultants to obtain the help they need. (Consultants have always been permitted by G.L. c. 40 B, § 21, and in 1989 in G.L. c. 44, § 53G, the legislature made it clear that a board may recover the costs through reasonable fees assessed to the developer. This Committee, in turn, has provided guidance concerning such fees in its Model Local Rules, § 4.00, which are authorized by 760 CMR 31.02(3)(a).) But whichever approach is used, the change represents a positive evolution that provides towns with benefits to offset the burdens. Thirty years ago, towns that were actively opposed to affordable housing were forced to accept cookie-cutter, rental, low-income housing developments developed by bureaucracies in Boston or Washington, D.C. Today's affordable housing is more varied, typically mixed-income, and as frequently homeownership as rental. But more important, in newer programs, such as the DHCD Local Initiative Program, towns, whether enthusiastic or circumspect in their view of affordable housing, are empowered to shape individual developments to fit their particular circumstances. Thus, in place of command and control by centralized bureaucracies, the NEF relies on market forces, on expertise found in the private sector, and on local control to build better affordable housing.²³

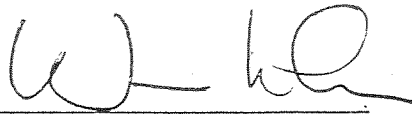
²³ The importance of local control, particularly in communities which are supportive of affordable housing, was highlighted in the conclusion to the legislative Report of the Special Commission, *supra*, at 28: "The Commission's recommendations reflect the need... to foster local initiative responses....[and to] allow responsive municipalities...to have greater control in the comprehensive permit process." (Quoted at 760 CMR 30.01(3).)

VI. CONCLUSION

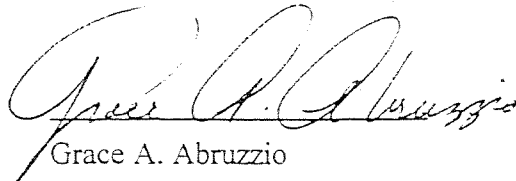
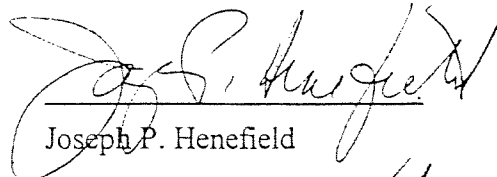
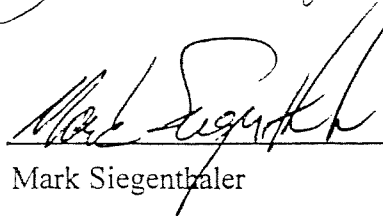
The Committee concludes that the jurisdictional requirements of the comprehensive permit law have been satisfied, and we therefore remand this case to the Barnstable Board of Appeals for hearing on the merits in conformity with this decision.

Housing Appeals Committee

Dated: March 5, 1999



Werner Lohe
Chairman


Grace A. Abruzzio
Joseph P. Henefield
Mark Siegenthaler